not be exempt from the application of laws of general applicability if he had raped an alter boy. As Justice Kozinski stated in his concurring opinion in *Elvig*, "The ministerial exception applies, if at all, based on the plaintiff's status as a minister." *Id.* at 796.

Likewise, the District Attorney's Office is interested only in documents that contain evidence of criminal sexual abuse of children. The critical question for this office is not whether the office of the Vicar for Clergy has a religious purpose, but rather whether the documents that office possesses contain evidence of crime. The criminal laws are neutral as concerns religion. Investigation of these crimes is no more invasive of a religious institution than of an educational institution or a health institution.

III. THE FREE EXERCISE ISSUE HAS BEEN DECIDED ON INDEPENDENT STATE GROUNDS

Does 1 and 2 also request that this Court abandon the neutral law of general applicability test announced in *Employment Div., Dept. of Human Res. of Or. et al. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) in favor of the compelling state interest balancing test of *Sherbert v. Verner*, 374 U.S. 398 (1963). However, both the Archdiocese and Does 1 and 2 invited this Court to decide the free exercise claim based on California Constitution Article I, section 4, which provides that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Based upon the California Supreme Court's decision in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 32 Cal.4th 527 (2004), (writ of certiorari denied at 543 U.S. 816 (2004)), the court below stated "we conclude that even if the pre-*Smith* compelling

state interest test governs a California free exercise claim, that test is met here." *Roman Catholic Archbishop v. Superior Court,* 32 Cal. Rptr. 3d at 225, 131 Cal.App.4th at 438; A-28.

A state court opinion that discusses federal and state law does not confer jurisdiction on this Court when the state law analysis is independent of federal law and is adequate by itself to support the judgment. *Sochor v. Florida*, 504 U.S. at 533-34; *Michigan v. Long*, 463 U.S. at 1038, n.4; *Fox Film Corp. v. Muller*, 296 U.S. at 210.

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CONCLUSION

As this Court stated in *Branzburg v. Hayes* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972): "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law or statutory privilege. . . ." *Id.* at 688. Where the state seeks evidence of criminal sexual child abuse by priests, the church may not interpose the First Amendment religion clauses in order to shield such evidence from review by the grand jury. *Society of Jesus of New England,* 808 N.E.2d 272, 441 Mass. 662; *People v. Campobello,* 810 N.E.2d. at 317, 348 Ill.App.3d 619. The People of the State of California respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(3)

No. 05-1039

In The
Supreme Court of the United States

DOES 1 and 2,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District, Division Three

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

PETITIONER'S REPLY BRIEF

Petitioners reply to the Opposition of the District Attorney as follows:

First, the Opposition contains misleading language about the decision below from the beginning, where it states, "The court below appropriately relied on its previous decision *in this case* on the issue of the proper interpretation of California State law concerning California grand jury subpoenas." [Emphasis added.]

It appears that the District Attorney is trying to convey the impression that the lower court's decision in *M.B. v. Superior Court,* 103 Cal. App.4th 1384 (2002) involved the *same case* as this Petition does, and that since *M.B.* was not appealed, somehow this case cannot be appealed.

It is important to clarify the record.

This Petition does *not* involve the same case as *M.B.* This Petition involves *different subpoenas*, issued by a *different grand jury*. The subpoenas in *M.B.* were quashed on other grounds by the trial court. This Petition involves *different Petitioners*.[1]

Further, in its decision in this case, the Court of Appeal initially erroneously assumed this case was the same as *M.B.*, and issued an opinion holding that the *M.B.* constituted "the law of the case." Petitioners filed a timely Petition for Rehearing, pointing out that, although the

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[1] *M.B.* was brought by three priests, of which Doe 1 was one party. Doe 2 in this Petition was not a party in any manner to the *M.B.* litigation.

subpoenas were similar, the cases were *different* – different parties, different grand juries, different subpoenas – *and the Court of Appeal thereupon modified its ruling*, and ruled on the merits by invoking the precedent of *M.B.* The modified opinion omitted entirely reference to the "law of the case" doctrine, and instead simply applied the reasoning from *M.B.* Appendix, page 1, in the caption of the decision below reflects this modification, where it states, "As Modified on Denial of Rehearing Aug. 16, 2005."

Therefore, this case is properly before this Court.

Second, although it is true that the court below *entirely* ignored the Fourth Amendment and the cases, such as *Boyd v. United States,* 116 U.S. 616 (1886) that were cited to it by Petitioners and that were the core of Petitioners' arguments on the minimal Constitutional requirements for grand jury subpoenas, it does not follow that the Fourth Amendment does not apply in California. The landmark decision of *Mapp v. Ohio*, 367 U.S. 643 (1961) held "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth." (At 655.) Since then it has been beyond dispute that states cannot drop below the protections granted by the Fourth Amendment against unreasonable searches and seizures.

It is incumbent on this Court to restore the protection of the Fourth Amendment for citizens of California as it applies to criminal and grand jury subpoenas. As of now, because of the convoluted and erroneous logic of the decision below and its ancestor, *M.B. v. Superior Court, supra,* grand juries, prosecutors, and criminal defendants all can compel Californians to produce in court their private papers with absolutely no showing of cause. In the

case of grand juries, there is not even a statute that provides for them to issue subpoenas duces tecum – a blatant deviation from the rule of *Boyd v. United States, supra.* Said that Court, quoting Lord Camden in *Entick v. Carrington,* 19 Howell's State Trials 1029 (1765), "If it [search and seizure authority] is the law, it will be found in our books; if it is not found there, it is not the law."

Third, the District Attorney, in trying to persuade this Court that "independent state grounds" exist to ignore the Fourth Amendment, continues the lower court's misconstruction of the holding of one state court opinion, *Pitchess v. Superior Court*, 11 Cal.3rd 531 (1974), contending that it stands for the proposition that "the affidavit requirement did not apply to California grand jury proceedings." As Petitioners pointed out in the Petition, at page 5, *Pitchess* expressly held the opposite: that the affidavits submitted for the criminal subpoena duces tecum in that case were *sufficient.*

The pertinent holding of the California Supreme Court in *Pitchess* is:

> "Were a court to require strict adherence to the provisions of Code of Civil Procedure sections 1985 (the subpoena duces tecum affidavit requirement) and 2036, subdivision (a), (a separate requirement for a showing of good cause and materiality in civil requests for production of documents), it is likely that Fifth Amendment problems would develop in many instances. Therefore, in contrast to the formal requirements for civil discovery, an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. The requisite showing may be satisfied by

> general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime.'" (Citations omitted.)
>
> "In the case at bar, *the affidavits filed by defendant are clearly sufficient to justify discovery under the foregoing standard.*" (At 536-537, emphasis added.)

In any event, Petitioners submit that no "independent state grounds" can eliminate the application of the Fourth Amendment to criminal and grand jury subpoenas. "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn,* 34 U.S. 117, at 125-126 (1945). In this case, *no* California statute grants power to grand juries to issue the subpoenas involved in this case, and without a very clear legislative grant of such power, the Fourth Amendment says it cannot exist.

Further, if California grand juries can somehow, consistent with the Fourth Amendment, avail themselves of the separate provisions for criminal trial subpoenas, such subpoenas would have to be accompanied by the affidavits of good cause and materiality provided by statute that all California cases required prior to the aberrant decision of *M.B. v. Superior Court, supra,* as detailed in the Petition herein at pages 14-15, since that is the only subpoena duces tecum process provided by the California legislature that comports with the established standards of the Fourth Amendment. Petitioners submit that, in his zeal to pursue these subpoenas, the District Attorney has overlooked the wider consequences of a rule

that no showing of cause whatever is required for criminal subpoenas duces tecum in California. Petitioners further submit that rule cannot possibly be reconciled with the protection of the Fourth Amendment.

Fourth, the District Attorney's contention in his Opposition overstates the notion that the court below resolved all of the Fourth Amendment issues on "independent state grounds." On the claim that the subpoenas are so overbroad – especially in light of the sensitive invasion into religious relationships at the core of the institution of the Roman Catholic Church – that they constitute "fishing expeditions" in violation of the Fourth Amendment, the court below struggled with and purported to construe the Fourth Amendment itself. (Appendix pages 59-61.)

Fifth, the District Attorney apparently misconstrues Petitioners' arguments based on the effect of these subpoenas on religious rights protected by the First Amendment. Petitioners have never argued that religious freedom permits priests to be free from prosecution for any crime. The essence of their first religious argument is that when the process of investigating the crime excessively chills freedom to practice religion, then that process may be prohibited. In this case, the subpoenas seek to invade previously sacrosanct communications within the Roman Catholic Church between a troubled priest and his bishop (together with the bishop's essential staff). Petitioners contend that such communications are *essential* to the bishop-priest relationship and the Catholic concept that priests represent Christ on Earth. If such broad subpoenas can be used to compel disclosure of these essential religious communications, it will – and according to the Petition filed by the Archdiocese, it already has – chill the

necessary open discussions between a priest and his bishop on matters exactly like those presented in this Petition. A bishop cannot be forced to wear a sheriff's badge and still be able to maintain his religious relationship with his priests.

Sixth, although the District Attorney contends Petitioners argued and the court below properly decided Petitioners' religious claims on "independent state grounds," that is not the case. Petitioners joined below in the Archdiocese's First Amendment arguments, but they also presented their own religious arguments, combined with Fourth Amendment arguments, based on federal law. In any event, the "independent state grounds" doctrine does not permit a state to apply a lower standard of protection to rights established by the United States Constitution. In this case, Petitioners have properly contended that the combination of rights based on the Free Exercise Clause of the First Amendment and the Right to Privacy, found in the Fourth Amendment and as it relates to sexual activity, provides the Constitutional critical mass to review *Employment Division v. Oregon,* 494 U.S. 872 (1990). The court below may have tried to avoid Supreme Court review by relying only on California precedent, but as we have shown above, that is insufficient where the court below "incorrectly adjudge[d] federal rights." *Herb v. Pitcairn, supra.*

In conclusion, Petitioners submit that the District Attorney's Opposition has done nothing to diminish the validity of Petitioners' arguments and the great importance of bringing California criminal and grand jury subpoena practice into compliance with the protections of the Fourth Amendment. For all the foregoing reasons, the

District Attorney's Opposition should be rejected and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 31, 2006